

## ARTICLES

### THE PRINCIPLES OF TRANSPARENCY AND INCLUSIVENESS AS PILLARS OF GLOBAL GOVERNANCE: THE BRICS APPROACH TO THE UNITED NATIONS

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*The transparency of governance is not only a necessary and sufficient condition for bringing about accountability, but also the basis for the possibility of democracy in the global sphere. Although there is no automatic progress from transparency to democratic global governance, this principle helps to create more democratic, open and fair societies. Recently, the importance of inclusiveness, transparency and procedural safeguards has emerged as a critical theme. The practical implementation of fair global governance mechanisms, procedures, and institutions will always depend on the level of participation, contestation, or solidarity among the different stakeholders represented at the local, national or international level. Recent years have clearly shown a trend towards increasing transparency and inclusiveness in international organizations' activities and operations, in contrast to opaqueness or lack of transparency which was a very common practice in diplomacy during past centuries. The inclusion of transparency and inclusiveness elements in the decision-making rules of an international organization are fundamental for these norms to be considered not only 'more legal,' but also to have a higher level of legitimacy. The General Assembly decided in its Resolution 60/251 of 2006 that the methods of work of the Human Rights Council should be transparent, fair and impartial and should enable genuine dialogue. Finally, the role played by the BRICS countries at the Security Council and the Human Rights Council is critical in regards to its working methods.*

*Keywords: transparency and inclusiveness; diplomacy; global governance; League of Nations; United Nations; diplomatic negotiations; Human Rights Council; Security Council; BRICS countries.*

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### 1. Introduction

This paper will analyze how diplomacy passed from being a secret affair to have a more public exposure in society. In particular, from the establishment of the League of Nations until today the principles of transparency and inclusiveness have occupied a central role in diplomacy, which has been considered as a revolutionary change of paradigm in international relations.

Additionally, a legal approach to the notion of transparency and inclusiveness will be studied, in the context of the current trend which demands more transparent and inclusive institutions and procedures at the international level. At this moment there is not an international treaty defining the notions of transparency and inclusiveness. In fact, the difficulties of defining these concepts are due, in the eyes of some, to the view that transparency, and also inclusiveness, are a 'myth.'

A reflection about the role played by transparency and inclusiveness in diplomatic negotiations, and in particular the contemporaneous preoccupation with legitimacy by international organizations will be provided, concluding with an emphasis that transparency and inclusiveness are indispensable elements of global governance. Currently, international democracy and global governance strongly requires more

transparency in the decision-making process and the participation of non-State actors in the elaboration of rules and norms.

Finally, the principles of transparency and inclusiveness will be analyzed in light of methods of work and the working culture of the Human Rights Council and the Security Council. In particular, the role played by the BRICS countries will be taken into account. All States are obliged to practice, as far as possible, the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international instrument.

## 2. From Secret to Open Diplomacy

The modern system of diplomacy, since its inception in the time of the Renaissance to the last part of the 19<sup>th</sup> century, was considered as a clandestine affair. For many centuries diplomacy was conducted secretly. The French elaborated in the 17<sup>th</sup> and 18<sup>th</sup> centuries a conception of diplomacy based on ceremonial processes, secrecy and professionalism.<sup>1</sup>

Since diplomacy is integrally linked to national interests, it was then believed that it was wiser to conduct diplomatic endeavor in secret for the benefit of the nation. The causes for secret diplomacy were national interest and war-time exigencies.<sup>2</sup>

It has been suggested that most wars in recent centuries have been caused because of the vanity of Heads of State to maintain in a thoughtless way the combative instinct of their peoples. All the glorious and provocative exhibitions of force and war have developed in the minds of the human population through the conquest of other territories.<sup>3</sup> In three thousand years, from 1,500 BC to 1860, 8,000 peace treaties have been signed.<sup>4</sup> Consequently, 'peace has always conducted to a war.'<sup>5</sup>

Historically, there are some noted examples of secret treaties in international politics, such as the Reinsurance Treaty of June 1887 between the German Empire and the Russian Empire, the Berlin Congress Treaty of 1878, the Sykes-Picot Agreement of 1916 between Russia and France or the 'Entente Cordiale' of 1904 between France and Britain.<sup>6</sup>

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<sup>1</sup> Annek Chatterjee, *International Relations Today: Concepts and Applications* 78 (Pearson 2010).

<sup>2</sup> Christer Jönsson, *Ch. 11. Diplomacy, Bargaining and Negotiations*, in *Handbook of International Relations* 212, 215 (Walter Carlsnaes et al., eds.) (SAGE Pub. 2002).

<sup>3</sup> Louis Eichner, *La paix des peuples ou essai d'une Confédération Internationale* 33–34 (Librairie Marcel Rivière 1922).

<sup>4</sup> George Valbert, *La guerre et la paix perpétuelle*, 1894(122) *Revue des Deux Mondes* 692, available at <[http://fr.wikisource.org/wiki/La\\_Guerre\\_et\\_la\\_Paix\\_perp%C3%A9tuelle](http://fr.wikisource.org/wiki/La_Guerre_et_la_Paix_perp%C3%A9tuelle)> (accessed Feb. 1, 2016); Jönsson, *supra* n. 2.

<sup>5</sup> Gaston Bouthoul, *Huit mille traités de paix* 12–13 (René Julliard 1948).

<sup>6</sup> Chatterjee, *supra* n. 1, at 78.

From the first half of 20<sup>th</sup> century, the demand for open diplomacy gained space in international politics. People and nations started to denounce secret diplomacy for two key reasons: the spread of democratic ideas and the hatred that a nation incurred due to secret diplomacy.<sup>7</sup> Open diplomacy has two features: firstly, rejection of the conclusion of secret treaties; and secondly, conducting of diplomatic negotiations in full public view.<sup>8</sup>

This shift came about following World War I. In the wake of this War, 'the secretiveness of the old diplomacy came to heavy criticism, and the entire diplomacy system was held responsible for the failure to prevent the outbreak of war.'<sup>9</sup>

After the Russian Revolution of 1917 the Soviets came to power. Trotsky disclosed that the Tsarist government had signed with the Entente powers, the Treaty of London and the Constantinople Agreement. He proposed the abolition of secret diplomacy.<sup>10</sup> This move caused embarrassment and 'a strong, sustained reaction against secret diplomacy.'<sup>11</sup>

Additionally, US President Woodrow Wilson was a strong opponent of secret diplomacy, because he viewed this practice as a clear threat to peace. In the speech delivered to Congress on January 8, 1918, he focused his attention to the abolition of secret diplomacy in the first point of his Fourteen Points, as follows:<sup>12</sup> 'Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.'

The Fourteen Points were based on a draft paper prepared by Walter Lippmann. His task was

to take the secret treaties, analyze the parts which were tolerable, and separate them from those which we regarded as intolerable, and then develop a position which conceded as much to the Allies as it could, but took away the poison . . . It was all keyed upon the secret treaties. That's what decided what went into the Fourteen Points.<sup>13</sup>

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<sup>7</sup> Chatterjee, *supra* n. 1, at 78.

<sup>8</sup> *Id.*

<sup>9</sup> Jönsson, *supra* n. 2, at 215.

<sup>10</sup> Charles M. Dobbs & Spencer C. Tucker, *Brest Litovsk, Treaty of (3 March 1918)*, in *Encyclopedia of World War I: A Political, Social, and Military History* 225 (Spencer C. Tucker, ed.) (ABC-CLIO 2005).

<sup>11</sup> Charles Lipson, *13. Why Are Some International Agreements Informal? (1991)*, in *International Law and International Relations: An International Organization Reader* 293, 329 (Beth A. Simmons & Richard H. Steinberg, eds.) (Cambridge University Press 2007).

<sup>12</sup> Glenn P. Hastedt, *Encyclopedia of American Foreign Policy* 170–71 (Facts on File 2004).

<sup>13</sup> Godfrey Hodgson, *Woodrow Wilson's Right Hand: The Life of Colonel Edward M. House* 160–63 (Yale University Press 2006).

President Wilson repeated his Fourteen Points at the Versailles peace conference of 1919, which created the League of Nations. In accordance with its Preamble of the Peace Treaty of Versailles, the promotion of international cooperation and the achievement of peace and security in the world should be achieved by the following means: firstly, the acceptance of the obligation not to resort to war; secondly, the prescription of open, just and honorable relations between nations; thirdly, the firm establishment of the understandings of international law as the actual rule of conduct among Governments; and fourthly, the maintenance of justice and a scrupulous respect for all treaty obligations.<sup>14</sup>

The Wilsonian proposal about the obligation of States to promote an open diplomacy was codified in Art. 18 of the Covenant of the League of Nations, which provided:

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

The objective of this provision is to ensure that all treaties remain in the public domain and thus assist in eliminating secret diplomacy. This led to the rise of the treaty registration system, 'although not every treaty that would have been subject to registration was duly registered.'<sup>15</sup> Among these secret treaties, it should be recalled that one of the most infamous secret treaties in history was the secret additional protocol to the Molotov–Ribbentrop Pact of August 23, 1939, between the Soviet Union and Nazi Germany.<sup>16</sup>

After World War II, the registration system that had begun with the League of Nations was continued through the United Nations.<sup>17</sup> Article 102 of the Charter of the United Nations, based on Art. 18 of the Covenant of the League of Nations, provides:

(1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

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<sup>14</sup> Christian Guillermet Fernández & David Fernández Puyana, *Building Human Rights, Peace and Development within the United Nations*, 3(1) RLJ 63 (2015).

<sup>15</sup> Helmut Tichy & Philip Bittner, *Article 80. Registration and Publication of Treaties*, in *Vienna Convention on the Law of Treaties: A Commentary 1339, 1340* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer 2012).

<sup>16</sup> Chris Bellamy, *Absolute War: Soviet Russia in the Second World War 50–56* (Vintage Books 2007).

<sup>17</sup> Tichy & Bittner, *supra* n. 15, at 1340.

The legal implications of Art. 102 are the following: firstly, each Member State has a legal obligation to register all international agreements / treaties concluded after the coming into force of the Charter; secondly, this obligation does not preclude international organizations with treaty-making capacity or non-Member States from submitting for registration treaties entered into with Member States; and thirdly, the Secretariat is mandated to publish all agreements registered.

Similarly, Art. 80 of the Vienna Convention on the Law of Treaties, which entered into force in 1980, requires:

(1) Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

(2) The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

According to Dörr and Schmalenbach's commentary on the Vienna Convention on the Law of Treaties, 'the fact that today secret treaties do not play an essential role is less a result of [Art. 102 of the UN Charter] than of an overall change in the conduct of international relations.'<sup>18</sup>

Consequently, we could conclude that after the creation of the League of Nations the principle of transparency opened a new era based on a different conception about international relations. Despite difficulties, this new path about how conducting diplomacy at all levels has continued until today and is also considered a revolutionary change of paradigm.

### **3. The Notion of Transparency and Inclusiveness under International Law**

#### **3.1. Definition**

In all major fields of international law<sup>19</sup> demands for more transparent and inclusive institutions and procedures have recently been voiced by civil-society actors, by states, and within the international institutions themselves. All of them consider that these principles positively contribute to global governance.<sup>20</sup>

It is not an easy task to define transparency and inclusiveness properly. The definition must, at the same time, be broad enough to cover many different situations

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<sup>18</sup> Tichy & Bittner, *supra* n. 15, at 1341.

<sup>19</sup> Environmental law, trade and investment law, human rights law, international humanitarian law, health law, or peace-and-security law.

<sup>20</sup> Anne Peters, 20. *Towards Transparency as a Global Norm*, in *Transparency in International Law* 534, 607 (Andrea Bianchi & Anne Peters, eds.) (Cambridge University Press 2013).

and precise enough to find application in practice.<sup>21</sup> The difficulties of defining this concept are due in the eyes of some to the view that transparency is a 'myth'.<sup>22</sup>

At this moment there is not a general international treaty defining or even recognizing transparency and inclusiveness, and such a codification would probably not be feasible. The question is to know whether a customary international law principle of transparency and inclusiveness exists, in accordance with Art. 38 of the Statute of the International Court of Justice.

In order that the notion of transparency and inclusiveness becomes a norm in light of international law requires two fundamental preconditions: firstly, it must be sufficiently precise to generate an obligation and to assess its implementation; and secondly, it must have an obligor and an obligee. Both conditions are not easily fulfillable with regard to the transparency buzzword. As a result, it would seem difficult to argue that currently transparency as such is a norm of hard international law.<sup>23</sup>

The right to information could function as a catalyzer for the consolidation of the transparency principle. This right is foreseen in all regional and universal human rights agreements. It is today no longer interpreted exclusively as a governmental negative obligation not to mount obstacles to the diffusion of information which is already present in the public space, but as a positive right.<sup>24</sup>

The European Court of Human Rights for example has derived from the provision of Art. 10 of the European Convention on Human Rights (the freedom to receive or to communicate information and ideas) an individual right of access to public documents.<sup>25</sup>

The Human Rights Committee in its General Comment No. 34 on Art. 19 of the Covenant on Civil and Political Rights of 2011 goes along these lines. It offers an important, extended reading of the human right to information, and understands it as encompassing a right of access to official documents held by States, and to documents held by functionally public actors.<sup>26</sup>

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<sup>21</sup> Laurence B. de Chazournes, *Concluding Remarks. Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 *International Organizations Law Review* 655, 659 (2009), available at <[http://papers.ssrn.com/abstract\\_id=2090895](http://papers.ssrn.com/abstract_id=2090895)> (accessed Feb. 1, 2016). doi:10.1163/157237409X477734

<sup>22</sup> Jacques Chevallier, *Le mythe de la transparence administrative*, in *Information et transparence administrative* 239 (François Rangeon et al., eds.) (PUF 1988), available at <<https://www.u-picardie.fr/crurapp-revues/root/21/chevallier.pdf>> (accessed Feb. 1, 2016).

<sup>23</sup> Anne Peters, *The Transparency Turn of International Law*, 1 *The Chinese Journal of Global Governance* 3, 6 (2015), available at <<http://booksandjournals.brillonline.com/content/journals/10.1163/23525207-00000002?crawler=true&mimetype=application/pdf>> (accessed Feb. 1, 2016) [hereinafter Peters, *The Transparency Turn*].

<sup>24</sup> Peters, *The Transparency Turn*, *supra* n. 23, at 6.

<sup>25</sup> *Gillberg v. Sweden*, ¶ 93, no. 41723/06 (Eur. Ct. H.R., Apr. 3, 2012).

<sup>26</sup> *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, U.N. GAOR, Hum. Rts. Comm., 102<sup>nd</sup> Sess., U.N. Doc. CCPR/C/GC/34 (2011), at <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> (accessed Feb. 1, 2016).

### 3.2. Regulation

The notion of transparency and inclusiveness also focuses its attention and increasing demands on the transparency of those actors who play an active role in global governance. In particular, the international instruments and institutions in which the notion of transparency and inclusiveness has widely been elaborated are the following:

At the regional level, we could stress that the UN Economic Commission for Europe adopted in 1998 the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>27</sup> Additionally, it is important to remember the European Union adopted in 2001 the Regulation of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission Documents.<sup>28</sup> Finally, we should recall that the Council of Europe adopted in 2009 the Convention on Access to Official Documents.<sup>29</sup>

At the United Nations level, the UN Human Rights Council adopted in 2012 the Framework Principles for Securing the Human Rights of Victims of Terrorism.<sup>30</sup> With regard to the World Trade Organization [hereinafter WTO], the Sutherland Report devoted an entire section to the debate on improving the transparency of the WTO and civil society involvement.<sup>31</sup> Also the World Bank issued its 'The World Bank Policy on Access to Information'.<sup>32</sup>

A final example to be recalled is the initiative of the 'Small 5' (a group of small states)<sup>33</sup> of 2012, which suggested a draft resolution 'Enhancing the Accountability,

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<sup>27</sup> Preamble, para. 12: 'Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings . . .'

<sup>28</sup> Summary: 'The purpose of this Regulation is to make access to the documents of the European institutions easier for citizens.'

<sup>29</sup> Preamble, para. 5: 'Considering the importance in a pluralistic, democratic society of transparency of public authorities . . .'

<sup>30</sup> *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. GAOR, Human Rights Council, 25<sup>th</sup> Sess., Agenda Item 3: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/20/14 (2012) (Special Rapporteur: Ben Emmerson), at <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf)> (accessed Feb. 4, 2016).

<sup>31</sup> Peter Sutherland, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium: Report by the Consultative Board to the Director-General Supachai Panitchpakdi ¶¶ 183–205* (World Trade Organization 2004), available at <[http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf)> (Feb. 1, 2016).

<sup>32</sup> *The World Bank Policy on Access to Information (July 1, 2013)*, <<http://documents.worldbank.org/curated/en/2013/07/17952994/world-bank-policy-access-information>> (accessed Feb. 1, 2015).

<sup>33</sup> Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland.

Transparency and Effectiveness of the Security Council' that was ultimately not adopted by the UN General Assembly.<sup>34</sup>

### **3.3. The Role Played by Transparency and Inclusiveness in Diplomatic Negotiations**

Both transparency and accountability are eventually part of the contemporaneous preoccupation with legitimacy of international organizations. The quest for legitimacy in international law has been discussed quite extensively. A norm produced by an organization, through a transparent procedure, will have higher legitimacy.<sup>35</sup>

Transparency is a requisite for ensuring an adequate level of accountability. The channels of transparency may vary. Most of the time transparency will be directed to the authority to which the institution is accountable. The institution is required to justify its actions and decisions towards the authorities and, bear the consequences of these acts in the case of eventual misconduct, but also in relationship to other actors in a more general manner due to its 'public exposure'.<sup>36</sup>

Accountability is an element of legitimacy, because it forces the policy makers to respond to the needs and interests of individuals. Transparent procedures contribute to the legitimacy of standards. This means that agendas, proposals, votes in committees, minutes of sessions, and drafts for standards should be generally publicized.<sup>37</sup>

One of the biggest problems related to transparency concerns the field of international law-making which traditionally is the result of diplomatic negotiations. In fact, confidentiality is deemed to be a fundamental feature of the diplomatic arena.<sup>38</sup> In addition, some experts add that 'there are countervailing legitimate interests, such as security, privacy, and business or trade secrets which must be balanced against the benefits of transparency'.<sup>39</sup>

Tensions between confidential or transparent, and private or inclusive, are not easily resolved. Not all diplomatic negotiations can be considered private / confidential or transparent / inclusive in an absolute sense. What is required is a balancing of competing values that takes into account the circumstances of the negotiation in each situation.<sup>40</sup>

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<sup>34</sup> *Enhancing the Accountability, Transparency and Effectiveness of the Security Council: Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Revised Draft Resolution*, U.N. GAOR, 66<sup>th</sup> Sess., Agenda Item 117: Follow-Up to the Outcome of the Millennium Summit, U.N. Doc. A/66/L.42/Rev.2 (2012), at <[http://csnu.itamaraty.gov.br/images/26\\_A\\_66\\_L\\_42\\_Rev.2\\_Small-5.pdf](http://csnu.itamaraty.gov.br/images/26_A_66_L_42_Rev.2_Small-5.pdf)> (accessed Feb. 1, 2016).

<sup>35</sup> Chazournes, *supra* n. 21, at 664.

<sup>36</sup> *Id.* at 662.

<sup>37</sup> Anne Peters et al., 18. *Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters*, in *Non-State Actors as Standard Setters* 492, 516 (Anne Peters et al., eds.) (Cambridge University Press 2009). doi:dx.doi.org/10.1017/CBO9780511635519.019

<sup>38</sup> Peters, *The Transparency Turn*, *supra* n. 23, at 8.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration* 2, <[http://papers.ssrn.com/abstract\\_id=1618843](http://papers.ssrn.com/abstract_id=1618843)> (accessed Feb. 1, 2016).

Many negotiation processes frequently lacks transparency, inclusiveness and equal participation of stakeholders and the public. The negotiations should be conducted, as far as their nature makes it possible, in an open and transparent manner. They should allow for participation by all stakeholders in the negotiations that are potentially affected by the agreement in an open and nondiscriminatory manner.

Today, it is generally assumed that the participation of other stakeholders, including civil society, in a negotiation process, coupled with safeguards for the protection of the principle of inclusiveness, is the best guarantee to secure the overall legitimacy of the legal standards adopted by the international organizations. At the end of the process, this new rules should guide and structure peoples' lives and thus should affect their needs, interests, and rights.

Transparency may be achieved by greater proximity between international organizations, non-State actors and individuals. Transparency, access to information and public participation in an inclusive manner are more and more intertwined. In this context, mechanisms allowing non-State actors to participate in decision-making processes can be seen as a form of transparency and inclusiveness.<sup>41</sup>

The general public should assume the function of an arbiter and therefore, they should also observe international negotiations. In this line, transparency seems to be an indispensable element of global governance. The more the international legal processes are open to the public in general, the more negotiations are compatible with publicity and transparency.<sup>42</sup> Consequently, transparency and inclusiveness have matured into primary pillars of good governance.<sup>43</sup>

Global governance and democracy needs transparency. The classic statement in this regard was tendered by James Madison, who stated:

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: [a]nd a people who mean to be their own Governors must arm themselves with the power which knowledge gives.<sup>44</sup>

Transparency might also have positive effects on diplomatic negotiations. One of these positive effects is what John Elster has called 'the civilizing force of hypocrisy.' Transparency could lead law- and decision-makers to base their positions on socially

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<sup>41</sup> Chazournes, *supra* n. 21, at 660.

<sup>42</sup> Peters, *The Transparency Turn*, *supra* n. 23, at 11.

<sup>43</sup> Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Probs.* 15, 37–42 (2005), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>> (accessed Feb. 1, 2016).

<sup>44</sup> James Madison, *Letter to W.T. Barry (August 4, 1822)*, *The Founders' Constitution* 9:103–09 (Philip B. Kurland & Ralph Lerner, eds.) (University of Chicago Press 1987).

accepted norms. Social pressure would lead them to justify their positions by taking into account the general interest and not their selfish interests.<sup>45</sup> However, some authors say that ‘total transparency of international law is neither appropriate nor realistic. International law- and policy-makers should treat transparency as a variable of institutional and legal design.’<sup>46</sup>

An example of an attempt to render diplomacy more transparent is the process of recent climate negotiations. The Conference / Meeting of the Parties of the UN Framework Convention on Climate Change and Kyoto Protocol held in Cancún in 2010 was explicitly conducted under the heading of transparency and inclusion.<sup>47</sup>

The Mexican conference’s President gave ‘full commitment to the principles of transparency and inclusiveness. There will be no parallel or overlapping discussions and I will continue ensuring that all positions are taken into account.’<sup>48</sup> In an informal meeting, the President also said on December 5, 2010: ‘The Mexican Presidency will continue to work with full transparency and according to established United Nations procedures.’

#### 4. Transparency and Inclusiveness within the United Nations

##### 4.1. Human Rights Council

On July 15, 2014, BRICS approved at the 6<sup>th</sup> Summit the Fortaleza Declaration in Brazil by which they pledged to foster dialogue and cooperation on the basis of equality and mutual respect in the field of human rights both within BRICS and multilaterally, including the UN Human Rights Council where all BRICS states serve as members in 2015. They also agreed ‘to continue to treat all human rights, including the right to development, in a fair and equal manner, on the same footing and with the same emphasis.’<sup>49</sup>

In the Ufa Declaration, which was adopted in Russia on July 9, 2015, BRICS countries undertook to strengthen coordination of their positions on the issues of mutual interest within the UN human rights institutions, including the Human Rights Council and the Third Committee of the UN General Assembly. In particular, they undertook to support the universal periodic review carried out by the UN Human Rights Council and constructively contribute to its work (¶ 10).

<sup>45</sup> Jon Elster, *Deliberation and Constitution Making*, in *Deliberative Democracy* 97, 111 (Jon Elster, ed.) (Cambridge University Press 1998).

<sup>46</sup> Peters, *The Transparency Turn*, *supra* n. 23, at 13.

<sup>47</sup> *Id.* at 11.

<sup>48</sup> UNFCCC *Informal Stocktaking Plenary, Statement by Her Excellency Mrs. Patricia Espinosa COP 16/CMP 6 President, 8 December 2010*, <[https://unfccc.int/files/meetings/cop\\_16/statements/application/pdf/101208\\_cop16\\_st\\_espinosa.pdf](https://unfccc.int/files/meetings/cop_16/statements/application/pdf/101208_cop16_st_espinosa.pdf)> (accessed Feb. 3, 2016).

<sup>49</sup> *Sixth BRICS Summit: Fortaleza Declaration* ¶ 28 (Jul. 15, 2014), at <<http://www.brics.utoronto.ca/docs/140715-leaders.html>> (accessed Feb. 3, 2016) [hereinafter *Fortaleza Declaration*]

In accordance with the UNGA Resolution 60/251 of 2006, the methods of work of the Human Rights Council should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness (Art. 110).

Additionally, the methods of work provide:

At least one informal open-ended consultation should be held on each draft resolution and / or decision before it is considered for action by the Council. Consultations should, as much as possible, be scheduled in a timely, transparent and inclusive manner that takes into account the constraints faced by delegations, particularly smaller ones (Art. 113).

The statement by the President PRST 29/1 'Enhancing the Efficiency of the Human Rights Council' of 2015 stressed the importance of respecting the principles of transparency and inclusiveness, in the following terms:

*Stresses* the need to respect and implement the provisions in 5/1 and 16/21 relating to the working culture of the Human Rights Council, including the need for early notification of proposals, early submission of draft resolutions and decisions by the end of the penultimate week of a session as well as early distribution of all reports, and to observe the principles of transparency and inclusiveness with regard to the consultation process.<sup>50</sup>

As of today, the only instruments on human rights adopted by the Human Rights Council<sup>51</sup> and after, by the General Assembly are the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008<sup>52</sup> and also the UN Declaration on Human Rights Education and Training in 2012.<sup>53</sup> These texts have been classified as models of transparency and inclusiveness, because not only

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<sup>50</sup> *Enhancing the Efficiency of the Human Rights Council: Statement by the President*, U.N. GAOR, Human Rights Council, 29<sup>th</sup> Sess., Agenda Item 1: Organizational and Procedural Matters, U.N. Doc. A/HRC/29/L.34 (2015), at <<https://www.google.ru/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwj2kLCjiNzKAhVEEHKHT36BFoQFggzMAM&url=http%3A%2F%2Fwww.universal-rights.org%2Fwp-content%2Fuploads%2F2015%2F07%2FEnglish-oral-revision.docx&usq=AFQjCNGoZFGuN92cnRim03N35tVtyC5pyw&sig2=Ggwhdm8KITEp-wmljd9dPw&bvm=bv.113034660,d.bGQ>> (Feb. 3, 2015).

<sup>51</sup> *United Nations Declaration on Human Rights Education and Training*, U.N. Human Rights Council Res. 16/1, U.N. Doc. A/HRC/RES/16/1 (April 8, 2011), at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/124/78/PDF/G1112478.pdf?OpenElement>> (Feb. 3, 2016).

<sup>52</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UNGA Res. 63/117, U.N. Doc. A/RES/63/117 (December 10, 2008), at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/477/81/PDF/N0847781.pdf?OpenElement>> (Feb. 3, 2016).

<sup>53</sup> *United Nations Declaration on Human Rights Education and Training*, UNGA Res. 66/137, U.N. Doc. A/RES/66/137 (February 16, 2012), at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf?OpenElement>> (accessed Feb. 3, 2016).

a cross regional group of countries was set up, but also large networks of civil society organizations actively participated in all negotiation processes.

Consequently, all States are obliged to practice, as far as possible, the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international instrument. A norm produced by the Human Rights Council, through a transparent procedure and inclusiveness, will have always higher legitimacy.

Therefore, if a negotiation or consultation process lacks transparency, inclusiveness and equal participation of all stakeholders, States will fail in their obligation of implementing properly the methods of work and the working culture specially envisaged for the efficiency of Human Rights Council.

#### **4.2. Security Council**

In the 3<sup>rd</sup> BRICS Summit, which took place in Sanya on the island of Hainan, China, on April 14, 2011, the five heads of state and government from the BRICS states called for 'comprehensive reform of the UN, including its Security Council.' China said it would endorse the aspirations of India, Brazil and South Africa for permanent membership of the Security Council. Coincidentally, in 2011 the five countries were all members of the Security Council, China and Russia as permanent members and the other three non-permanent.

The Fortaleza Declaration, which was adopted by BRICS on July 15, 2014, in Brazil, stressed the need for a comprehensive reform of the UN, including its Security Council, with a view to making it more representative, effective and efficient, so that it can adequately respond to global challenges. Both China and Russia reiterated the importance they attach to Brazil, India and South Africa's status and role in international affairs and support their aspiration to play a greater role in the UN.<sup>54</sup>

Also the Ufa Declaration, adopted by BRICS countries in Russia on July 9, 2015, reaffirmed the need for a comprehensive reform of the United Nations, including its Security Council (¶ 4).

In the context of the 70<sup>th</sup> Session of the General Assembly held in September 2015 in New York, the foreign ministers of BRICS countries endorsed UN Security Council reforms saying it was necessary to make it 'more representative and efficient' putting China and Russia publicly on the side for reorganization.<sup>55</sup>

This statement should be understood in light of the Security Council reform, which formally started in the 90<sup>s</sup>. In particular, on December 3, 1993, the General Assembly adopted Resolution 48/26 'Question of Equitable Representation on and

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<sup>54</sup> *Fortaleza Declaration*, *supra* n. 49, ¶ 25.

<sup>55</sup> *BRICS Foreign Ministers Endorse UN Security Council, IMF Reforms*, Firstpost (Sep. 30, 2015), <<http://www.firstpost.com/world/brics-foreign-ministers-endorse-un-security-council-imf-reforms-2450154.html>> (accessed Feb. 3, 2016).

Increase in the Membership of the Security Council' by which it recognized 'the need to review the membership of the Security Council and related matters in view of the substantial increase in the membership of the United Nations, especially of developing countries, as well as the changes in international relations' and decided 'to establish an Open-ended Working Group to consider all aspects of the question of increase in the membership of the Security Council, and other matters related to the Security Council' (Art. 1).

In the UN Millennium Declaration, heads of state and government resolved to intensify their efforts to achieve comprehensive reform of the Council in all its aspects.<sup>56</sup> Additionally, in the 2005 World Summit Outcome of 2005, heads of state and government expressed support for early reform of the Security Council.<sup>57</sup>

The 'Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council' stressed that 'an all-encompassing solution, is not possible, and that only a realistic approach that allows agreement on what is achievable in the near term, without excluding any preferred option to be revisited at an agreed time through a mandatory review, is the way to move forward.'<sup>58</sup>

In Resolution 62/557 of 2008 entitled 'Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters,' Member States stressed that the intergovernmental negotiations should be based on five key issues, namely: categories of membership; the question of the veto; regional representation; size of an enlarged Security Council and working methods of the Council; and the relationship between the Council and the General Assembly.

In this process of the Security Council reform, the transparency of its working methods has played an important role. As an Annex XII of the 'Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council' (A/54/47), the Bureau on the working methods of the Security Council and transparency of its work prepared a conference room paper on this matter. On October 30, 1998, the President of the Security Council stressed in a statement<sup>59</sup> the importance of continuing to enhance the transparency of the methods of work of the Council.

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<sup>56</sup> *United Nations Millennium Declaration* ¶ 30, UNGA Res. 55/2, U.N. Doc. A/RES/55/2, at <<http://www.un.org/millennium/declaration/ares552e.pdf>> (accessed Feb. 3, 2015).

<sup>57</sup> *2005 World Summit Outcome* ¶¶ 153–54, UNGA Res. 60/1, U.N. Doc. A/RES/60/1, at <<http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>> (accessed Feb. 3, 2016).

<sup>58</sup> U.N. GAOR, 62<sup>nd</sup> Sess., Supp. No. 47, ¶ 30, U.N. Doc. A/62/47 (2008).

<sup>59</sup> *Note by the President of the Security Council*, U.N. Doc. S/1998/1016, at <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/sub%20bodies%20s%201998%201016.pdf>> (accessed Feb. 3, 2016).

On May 15, 2012, a group of five countries, among them Costa Rica and others,<sup>60</sup> presented before the General Assembly a resolution entitled ‘Enhancing the Accountability, Transparency and Effectiveness of the Security Council’<sup>61</sup> by which they invited ‘the Security Council to consider the measures contained in the annex to the present resolution, in order to further enhance the accountability, transparency and inclusiveness of its work, with a view to strengthening its effectiveness and the legitimacy and implementation of its decisions’ (Art. 2).

Among the measures identified by the five small countries are the following highlights: firstly, relationship with the General Assembly and other principal organs; secondly, effectiveness of decisions; thirdly, operations mandated and on-site missions carried out by the Security Council; fourthly, governance and accountability; and fifthly, the use of veto. In particular, they proposed ‘[r]efraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity’ (Art. 20).

Switzerland withdrew the Draft Resolution during the General Assembly which was aimed at improving the Security Council’s working methods in order to avoid ‘politically complex’ wrangling. The sponsors of the Draft, which focused on improving the Security Council’s working methods and included an annex with 20 recommendations, had come under increasing pressure. The Swiss Ambassador said the five powerful permanent members – China, France, Russian Federation, United Kingdom and the United States – feared that the proposals could be ‘divisive or be used against them.’

## 5. Conclusion

Since the inception of the League of Nations in 1919 diplomacy passed from being a secret affair to have a more public exposure in society. The new open diplomacy rejected the conclusion of secret treaties and demanded that diplomatic negotiations be conducted in full public view. After World War II, the registration system that had begun with the League of Nations was continued through the United Nations, ensuring that transparency and inclusiveness occupies a central role in diplomacy.

Currently, there is a trend demanding more transparent and inclusive institutions and procedures at the international level. At this moment there is not an international treaty defining the notion of transparency and inclusiveness. In fact, for many scholars, practitioners and politicians full transparency and inclusiveness is a ‘myth.’

Transparency and inclusiveness are indispensable elements for global governance. International democracy strongly requires more transparency in the

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<sup>60</sup> Jordan, Liechtenstein, Singapore and Switzerland.

<sup>61</sup> See *supra* n. 34.

decision-making process and the participation of non-State actors in the elaboration of rules and norms. Both transparency and accountability are eventually part of the contemporaneous preoccupation of legitimacy of international organizations. A norm produced by an organization, through a transparent and inclusive procedure, will have higher legitimacy.

Finally, the principles of transparency and inclusiveness have been included in the methods of work and the working culture of the Human Rights Council and the Security Council. In accordance with the current international legal system, all States should pay special attention, as far as possible, to the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international human rights instrument. In this context, the role played by the BRICS countries in both UN bodies is critical in regards to its working methods.

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